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LEADING ARTICLES

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MISSISSIPPI LAW JOURNAL

JOURNAL of the MISSISSIPPI STATE BAR ASSOCIATION

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THE FEDERAL EMPLOYERS' LIABILITY ACT

By Ellis B. Cooper*

It would be an interesting task to follow the course of a transcontinental train over the United States and note the rules of the various states with reference to the injury or death of an employee thereon. The laws of each state on this subject differ. In one the fellow-servant doctrine has been abolished. In another, it is still applied in its common law strength. In a third, it is modified by statute or the court's interpretation of the common law differs from that of another court. The same is true of assumed risks. The same is true of contributory negligence. The same is true as to the burden of proof and statutes pertaining thereto. This situation now exists as to employees of railroad companies who at the time of their injury or death were engaged in intrastate commerce.

The social, economic, and legislative history of the Federal Employers' Liability Act indicates that by this act relief was sought from the hard rules enforced in many states in cases of injury or death of a railroad employee. The operation of a railroad had become a very complex matter. Known always as a dangerous business, it was and is a dangerous business notwithstanding the safety appliances. The fellow-servant rule and contributory negligence were in many states a great barrier to recovery in the cases of injury or death. The power of the states to fix the liability in the case of an employee engaged in interstate commerce found its basis in the fact that Congress had failed by legislation to occupy this particular field. The power of Congress to deal with the subject is derived from its power to regulate commerce among the several states and foreign countries. Many great minds were of the opinion that

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Congress had no power to deal with the relationship of master and servant under the interstate commerce clause of the Constitution of the United States. In fact, when the first Federal Employers' Liability Act was passed in 1906, a great question involved was the power of Congress to deal with the relationship of master and servant. In the case of *Howard vs. Illinois Central Railroad Company,* 207 U. S. 463, the power of Congress to deal with the relationship of master and servant in the case of an employee of a common carrier by railroad when the master and the servant at the time of the injury or death were engaged in interstate commerce was definitely and finally established. But the first act was held to be unconstitutional because it was not limited in its operation strictly to the field of interstate commerce. The Act of April 22, 1908, cured the defects of the first Act and in the case of *Mondou vs. New York, New Haven and Hartford Railroad Company,* 223 U. S. 1, the validity of this Act was finally adjudicated.

At this time, as pointed out, the rights and duties of master and servant had been fixed in the various states by judicial decision, statute, and in some states even by constitutional provision. This was true in the State of Mississippi where the framers of the Constitution had seen fit to deal with one or more phases of the master and servant law. It has been thought that it would be of interest generally to lawyers to point out the changes in the law of Mississippi in personal injury cases where an employee sued the railroad company for an injury or where his representative sued for his death occurring in his employment.

It is still true that a great many cases are settled by the laws of Mississippi wherein the plaintiff is an employee and the defendant a common carrier by railroad. But these cases are those where at the time of the injury or death the employee was engaged in intrastate commerce.

Before going, however, into the details of the act, it might be well to note the extent of the field which this Act occupies. At the outset of litigation under the Act, there was a good deal of conjecture in many cases as to whether there was employment in interstate commerce as required before the Act became operative in that particular case. The holdings of the Supreme Court of the United States on this subject are final and conclusive. To one not familiar with the cases the extent of the field is rather amazing. There has been no attempt by the courts to fix any definite formula by which the applicability of the Act may be determined. The settlement of this question at times is a difficult matter. There are many instances on the border

line where an expression of the Supreme Court of the United States is necessary to fix finally the nature of the employment. But it is definitely established that the Act does not apply unless at the time of the injury the railroad and the servant were engaged in interstate commerce or in work so closely related thereto as to be a part thereof. In the case of *Pedersen vs. Delaware Railroad Company,* 229 U. S. 146, the Supreme Court of the United States states that the question is:

"Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it?"

Some of the cases will throw some light on the answer to this question. An employee on a train containing cars of both interstate and intrastate commerce is engaged in interstate commerce and within the Act. *Philadelphia Railroad Company vs. Polk,* 266 U. S. 332. A brakeman on a train carrying interstate commerce and injured while setting out a car carrying intrastate commerce on a siding was engaged in interstate commerce and was within the Act. *New York Railroad Company vs. Carr,* 238 U. S. 260. A fireman prepared his engine for a trip. It was to be attached shortly to an interstate train. After preparing the engine, he goes to his rooming house and while on the way he was killed by a switch engine. It was held that he was within the Act. *North Carolina Railroad Company vs. Zachary,* 232 U. S. 248. An employee operating a pump which aids in supplying water to trains engaged in interstate commerce is within the Act. *Erie Railroad Company vs. Collins,* 253 U. S. 77. A flagman at a street crossing who flags both interstate and intrastate trains is engaged in interstate commerce and is within the Act. *Philadelphia Railroad Company vs. Di Bonato,* 256 U. S. 327. An employee assisting in making up an interstate train in the yards is within the Act. *St. Louis Railroad Co. vs. Conarty,* 106 Ark. 421, 238 U. S. 243. An employee carrying bolts for the repair of a bridge which was a part of a track already used in interstate commerce is within the Act. *Pedersen vs. Delaware Railroad Company,* 229 U. S. 146. A switchman whose work during the day was that of switching both interstate cars and intrastate cars is within the Act in leaving the yards at the end of his day's work. *Erie Railroad Company vs. Winfield,* 244 U. S. 170.

The cases cited are but a very few of the decided cases. The Supreme Court of the United States, Circuit Courts of Appeal, and the Appellate Courts of the several states have decided many cases on this subject. The cases cited,

however, will serve to show the extent of the field occupied by the Federal Employers' Liability Act.

The first section of the Act provides that the railroad company shall be liable for the negligence of any of the officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, etc. It will be noted that liability under the Act is based upon the negligence of an employee or defects in the machinery, appliances, or place of work. In the case of *Southern Railroad Company vs. Gray,* 241 U. S. 333, the Supreme Court of the United States says:

"If the action is under the Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of the common law as interpreted and applied in Federal Courts."

A case showing the exclusiveness of this Act when the employee and railroad company are engaged in interstate commerce at the time of the injury or death is that of *Seaboard Airline Railroad Company vs. Horton,* 223 U. S. 492.

FELLOW-SERVANT RULE.

It will be noted that by Section One of the Act the fellow-servant rule is entirely abolished. The Act provides that there shall be liability where the injury or death results "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier."

The abrogation of the fellow-servant rule was nothing new in Mississippi. Section 193 of the Constitution of 1890 modified the fellow-servant rule and under chapter 194 of the Laws of 1908 this rule in so far as railroad companies and their employees were concerned was entirely abolished.

ASSUMED RISKS

The third section of the Federal Employers' Liability Act provides in part as follows:

"In action brought against any common carrier under or by virtue of any provision of this chapter . . . such employee shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

In the case of *Jacobs vs. Southern Railroad Company,* 241 U. S. 229, the Supreme Court of the United States held that assumption of risk as known at common law was a defense to the carrier except in cases where there was a violation of the safety appliance act enacted by Congress. See also the case of *Seaboard Airline Railroad Company vs. Horton,* 223 U. S. 492. The Supreme Court of Mississippi

in the case of *Yazoo Mississippi Valley Railroad Company vs. Dees,* 121 Miss. 439, 83 So. 613, said:

"It is probably a universal rule that the servant, merely by entering the service of the master, assumes the ordinary risks of the service, and if he is injured solely because of them, he cannot recover. But at common law, and under the Federal Employers' Liability Act, which controls here, risks created by the master's negligence are not assumed by the servant unless with an actual or constructive knowledge thereof and an appreciation of the danger therefrom he voluntarily enters or continues in the employment of the master."

Section 193 of the Constitution of 1890 completely abolished the doctrine of assumption of risk except in the case of engineers and conductors who voluntarily operated defective locomotives or cars. Under Chapter 156 of the Laws of 1914, assumption of risk was entirely removed as a defense in all cases where the negligence of the master caused the injury or death in whole or in part except in the case of conductors or locomotive engineers as provided in Section 193 of the Constitution. So in Mississippi the Federal Employers' Liability Act gave to the carrier a defense which it did not have before the enactment of the Federal Employers' Liability Act except in the two cases noted.

CONTRIBUTORY NEGLIGENCE

The Federal Employers' Liability Act established the principle of comparative negligence and abolished the defense of contributory negligence as a bar to the action. This was not done under the Laws of Mississippi until the enactment of Chapter 312 of the Laws of 1920.

BURDEN OF PROOF

We have had in Mississippi for many years the so-called "prima facie" statute which is now Section 1580 of the Code of 1930. This statute provides that proof of injury by the running of engines, locomotives, or cars, propelled by the dangerous agency of steam, etc., and running on tracks is prima facie evidence of the want of reasonable skill and care with reference to such injuries. This statute as construed by the Supreme Court of Mississippi was an important element in the trial of railroad cases. While creating a presumption only, yet its practical effect in some cases was to fix liability because of the inability of the defendant to rebut the presumption created. After the passage of the Federal Employers' Liability Act this statute was invoked in the case of *New Orleans and Northeastern Railroad Company vs. Harris,* 71 So. 913. The

Supreme Court of the United States reversed the Supreme Court of Mississippi, holding that the prima facie statute had no application in suits brought under and controlled by the Federal Employers' Liability Act.

Then, too, the "scintilla-of-evidence" rule does not obtain in the Federal Courts as it obtains in the courts of many States. No matter what rules may obtain in the several States, the facts are still for review by the Supreme Court of the United States. As said in the case of *Chicago M. & St. P. R. R. Co. vs. Coogan,* 271 U. S. 1041:

"The kind or amount of the evidence required to establish it (negligence) is not subject to the control of the several states. This court will examine the record, and if it is found that as a matter of law, the evidence is not sufficient to sustain a finding that the carrier's negligence was a cause of the death, judgment against the carrier will be reversed."

LIMITATION

The limitation on a right of action under the act is two years, four years shorter than under the law of Mississippi. The failure to plead the limitation will not affect the right where the date of the accident appears from the declaration and it is admitted in the answer. *Atlantic Coast Line R. R. Co. vs. Burnette,* 239 U. S. 226.

The question has arisen as to when the cause is barred by the limitation in the case of death where there is a failure to appoint an administrator. Some courts held that the limitation did not begin to run until the administrator was appointed. In the case of *Reading Co. vs. Koons,* 271 U. S. 58, the Supreme Court of the United States held that the two-year limitation began to run from the date of the accident rather than from the date of the appointment of the administrator.

Another interesting phase of the section relating to limitation of action is illustrated by a case from our own Court, viz: *Broom vs. Southern Ry. Co.,* 76 So. 525, 115 Miss. 493. There a suit was brought for the death of an engineer. The declaration showed employment in intrastate commerce. The railroad company pleaded that the employment was in interstate commerce. Thereupon, the plaintiff moved to amend so as to show employment in interstate commerce. The amendment was made more than two years after the injury. To this amended declaration the limitation of the Federal Employers' Liability Act was pleaded. But the Supreme Court of Mississippi held that the amendment related back to the filing of the suit and that the action was not barred. The correctness of this rule

finds support in many cases decided by the Supreme Court of the United States such as *Missouri, K. & T. Ry. Co. vs. Wulf,* 226 U. S. 570; *N. Y. C. R. R. Co. vs. Kinney,* 260 U. S. 340; *Seaboard Airline R. Co. vs. Reun,* 241 U. S. 290.

But a case of some interest where the amendment did not relate back is from our books, that of *Clark vs. G. M. & N. R. R. Co.,* 97 So. 185, 132 Miss. 627. In that case the declaration before amendment charged no specific act of negligence. It was simply a declaration under our "prima facie" statute, alleging injury by the operation of a motor car propelled by gasoline and running on tracks. To this the defendant pleaded that the plaintiff was engaged in interstate commerce as was defendant at the time of the injury. The plaintiff, thereupon, by leave of court and more than two years after the accident, filed an amended declaration setting out employment in interstate commerce and alleging a specific act of negligence. To this defendant pleaded the statute of limitations. This plea was sustained in the lower court and affirmed by the Supreme Court of Mississippi.

It will be noted, too, that there are no saving clauses in favor of minors or others laboring under disabilities. The statute is complete in itself and statutes of the several states saving rights to those laboring under disabilities have no application. *Vaught vs. Virginia R. Co.,* 132 Tenn. 679. Likewise a statute granting an additional year for another suit after abatement such as Sec. 2314 of Code of 1930, has no application. *Belch vs. Seaboard Airline Ry. Co.,* 176 N. C. 22.

DAMAGES RECOVERABLE

The damages recoverable for personal injury cover expense incurred, pain and suffering, and loss of earning power. *Michigan Central R. Co. vs. Vreeland,* 227 U. S. 59.

For death, the rule limits recovery to the pecuniary loss sustained. Grief and loss of companionship are not recoverable elements of damages. *Michigan C. R. Co. vs. Vreeland,* 227 U. S. 59. The recovery is limited to the pecuniary benefits of which the beneficiaries have been deprived. *Michigan Central R. Co. vs. Vreeland,* 227 U. S. 59; *Gulf Coast R. Co. vs. McGinnis,* 228 U. S. 173.

Where the named beneficiaries are not dependent on the deceased and the evidence fails to disclose reasonable expectation of pecuniary benefits had the deceased lived, there can be no recovery even though the railroad company was negligent. In the case of *G. M. & N. R. R. Co. vs. Simmons,* 109 So. 857, 144 Miss. 350, the beneficiaries were an adult

son and daughter who proved no dependence or expectation of pecuniary benefit. The Supreme Court held that even though the death was wrongful, there could be no recovery.

In that case, too, grandchildren were named as beneficiaries but there was no proof of expectation of pecuniary benefits. The Court said:

"It becomes unnecessary to decide whether grandchildren, under any state of facts whatever, may recover when children are left surviving. It will be noted that in the first section of the act the recovery is 'for the benefit of the surviving widow or husband and children; . . . and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee.' And in the last section it is provided that the cause of action shall survive to the personal representative of the deceased, 'for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee.' In the proper case, it might be a serious question whether, if the preferred beneficiaries under the statute failed to show a reasonable expectation of pecuniary benefits from the deceased during his lifetime, the beneficiaries next named in the statute would be entitled to recover, provided they showed a reasonable expectation of such benefits."

JURISDICTION

The act gives to the district courts of the United States jurisdiction of an action based thereon. Concurrent jurisdiction is placed in state courts. In addition to this, when suit is filed in state court and is based upon the Federal Employers' Liability Act, the cause cannot be removed to the Federal Court.

The concurrent jurisdiction in state courts has given rise to many interesting questions. For an instance, the Supreme Court of the United States has held that the burden of proof is substantial and not variable with the jurisdictions. So a verdict by a jury in a state where less than twelve may return the verdict is valid where the action is brought under the act. *L. & N. R. R. Co. vs. Stewart,* 241 U. S. 261.

When the suit is tried in the state court, the law of the forum controls, as to pleading and practice. Unless such pleading and practice deprives a party of some substantial right, the judgment will not be disturbed.

As to the effect of a rule of evidence there is a contrariety of opinion. In one state a doctor may not testify except at the instance or with the consent of the patient, the plaintiff. In another state, there is no such exclusionary rule. This is but an instance out of many. The exact

question has not been decided by the Supreme Court of the United States though writs of certiorari have been denied where a question of this character has been presented.

It is easy to see where exclusionary rules may be of a substantial nature in these cases. Practically they go at times to the very vitals of the case. The Supreme Court of the United States in *Chicago M. & St. P. R. R. Co. vs. Coogan,* 271 U. S. 1041, says:

"The kind or amount of the evidence . . . is not subject to the control of the several states."

Many questions yet remain for solution. This one act, so well illustrating the duality of our government and the supremacy of each in its field, is an interesting study and as judicial decisions increase will furnish a great mass of master-and-servant law.

OUR $70,000,000 EXPERIMENT

By J. N. Flowers*

The appearance of motor vehicles on the highways has created new problems. As the number and size of them increase the problems also increase. There are no questions before the public that are more alive and urgent than these. Every State is facing them and all the legislatures are searching for proper solutions. In the recent campaign in this State the aroused interest of the public in these questions was manifested wherever a candidate declared himself as a champion of changes that would wisely deal with these new conditions.

The improved highways are public works, constructed at public expense. They are the largest of our public works. More money is invested in road construction than in all other State enterprises. There are approximately $70,000,000 of bonds of road districts outstanding, bonds to be taken care of by ad valorem taxes and therefore a charge against the property of the citizens in road districts that practically cover the State. These bonds call for $3,500,000 in interest annually and about $3,000,000 of principal, *making an annual total at this time of about $6,500,000.* The property owners have to foot this bill. In addition to this $6,500,000, we are investing in maintenance and new construction large sums each year, making a grand annual total figure that is staggering. The duty rests upon the State to handle these funds wisely and to protect the interests of the contributing public. "The State holds its highways in trust for the public." *Northern Transportation Company vs. Chicago,* 99 U. S. 635, 25 L. Ed. 336, 338. The ultimate responsibility for the proper use of funds and for the protection of the highways constructed rests upon the State.

A revolution has come in the change from highways that were nothing more than cleared strips of land with the stumps removed and the surface provided with drainage, over which animal-drawn vehicles traveled, to highways on which a hard surface is provided and over which machines are operated. The animal preferred the yielding road surface; the machine demands a hard surface. As soon as a road is hard-surfaced the machine appears to make use of it. The well-constructed road is necessary to the machine. The automobile and the hard-surfaced road go together.

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Under the new regime the responsibility of the State is infinitely larger than it was in the dirt-road era. Now the highways have been changed into expensive public works, constructed by the use of public funds, under the superintendence of representatives of the State. The interests of the public, as represented by this investment, the State is duty bound to protect. It is the same duty that the State has to see to it that vandals do not deface and ruin the State Capitol or the State College buildings or the buildings occupied by its wards. The State exacts the contributions, compels the investment. It assumes the obligation to save the investors from loss and to make sure, as far as may be, that the public making the investment will receive therefor compensating benefits. And the investor, as far as such justice can be attained, should enjoy benefits in proportion to his contribution.

The ancient idea that the highway can be used for any kind of travel or transportation desired was valid as long as the highways were nothing more than cleared strips of land shaped up and provided with drainage and used only for ordinary travel. Not only did the public have no large investment in such roads but the vehicles in existence were not so different in character as to call for different regulations. If a heavy vehicle thought it could get over the bridges it was free to use the highway. The question was not whether it was safe for the road but whether it was safe for the vehicle. The opening up and the maintenance of the roads in Mississippi were in the hands of local authorities who acted through the road overseer and the "road hands." At intervals, the overseer, dressed with sovereign authority, usually on wet days, summoned the road hands. Each was directed what to bring,—a pick, a spade, a shovel, an axe, or what not. If he brought a mule and a plow the combination counted for two "hands." A mule was equal to a man. This system of providing roads is still in use where highways have not been taken over for construction purposes.

But when the highways become public works representing investments of public money, $10,000 to $35,000 per mile, the questions of contribution, compensation, maintenance, protection and relative rights in the highway become of supreme importance. The expensive construction must be protected against the damaging use thereof. The nature of the use comes to the forefront. The right to use it must have limitations. The use must be regulated in order to protect the structure and the investment therein. That such regulations are necessary has been demonstrated by ex-

perience. A large portion of the construction for which the $70,000,000 of now outstanding road district bonds were issued has crumbled into decay. The burden was placed upon the public to build roads expected to be of permanent character. They were built and used in the absence of proper regulations as to their use. They were exposed to the ancient belief that highways are free for use in whatever manner the user sees fit to adopt,—an idea that obtained when there were no extraordinary uses to which the highways could be subjected. In some instances little is left of the road-building enterprise except the bond burden which the public must liquidate during the next two or more decades. It was as if one should leave his improved premises for years without a caretaker. The owner of the farm with a tax burden on it to pay bonds used to build roads that have been destroyed by machines whose operation in no way helped the farm owner is the victim of criminal injustice. The structure was built in advance of the promulgation of rules and laws to protect it. The interests of the farm owner have been sacrificed in ill-advised experiments. He has been hurt by unjust discrimination.

The new conditions present new problems of regulation. How are the highways to be best preserved after the original investment is made? Who should contribute to the original investment and to the cost of current maintenance? These are questions of regulation.

The new vehicle has brought with it a source of revenue. The notion prevails that since these vehicles have taken possession of the highways, created an impelling necessity for improved highways and have brought with them a new source of revenue, this revenue should be employed on the highways. It is to be safely assumed that there will be few additional road bond issues to be redeemed by ad valorem taxes.

Since the State is engaged in the construction of these public roads at a large expense to the public, it is not equitable that the extent or the manner of the use should be ignored in proportioning the burden among the members of the public. Regulation should be based upon proper classification. If regulations could be ordained that would require the members of the public to bear the burden in proportion to their use of the highways such regulations would have universal approval. Let each pay according to the rights enjoyed, or, to accomplish the same result, let each pay according to the use he makes of the highway or in proportion to the damage his use occasions. Let each user pay in proportion to what he receives.

Of course no regulations could be found that would produce exact equality. All variations cannot be taken into account. The best regulations can be expected to do no more than to approximate the result aimed at. That manner of treatment is best which most nearly accomplishes the result that each user of the highway contributes to the cost of the enterprise in the proportion that his use bears to the entire use or the damage he does to the entire damage that is done.

The great majority of the motor vehicles on the improved highways consists of the ordinary automobiles, the kind owned and operated by every family. Of these there were registered in this State, in the year 1930, about 207,654. This means one such car to every 9.6 persons in the State. These automobiles vary in size but the impressions they make on the highways are approximately the same. They all have pneumatic tires. The weight ranges from 2,000 to 6,000 pounds. They make their contributions to the road fund in the form of license taxes determined by horse power. And they pay a gasoline tax. If the damage the larger one does the highway exceeds that done by the smaller one this difference is fairly covered, we may assume, by the larger license tax and the larger gasoline tax paid by the heavier machine. Hence it appears that legislation which should put all ordinary automobiles in the same class for uniform treatment would be reasonable and fair.

When we get beyond the general class comprising the 207,654 automobiles we come to another different class of vehicles known as trucks. Of these there are registered up to date this year 29,329. Usually the owner of a truck is also the owner of an automobile. The classification is not of owners and operators but of vehicles. The great majority of the people, practically all of them, use the automobile. A small minority use the truck. The trucks may be treated as making an extraordinary use of the highways. Their differences in weights and sizes are large. In fact the limits of possible capacities of such vehicles on the highways may not be now foreseen. The purpose for which a truck is operated over the highway does not affect the actual value of the use of the public facilities thus used nor the amount of damage occasioned to the highway by such operation. But the trucks that do the great damage are ordinarily engaged in an extraordinary use of the roads. A 10-ton truck passing over ten miles of road makes the same use of the highway and occasions the same maintenance expense whether the driver is the owner of it

or the hired operator of it, and whether the owner of the truck is the owner of the load or the load is the property of another. And the result is the same whether it is a common carrier truck, a contract carrier truck or a private transportation truck. The relevant inquiry is not Who is the owner of the truck? or Does the owner of the truck own the goods it carries? or Is it a contract or a common carrier? The material question is, What is the relative damage its operation occasions to the highway?

While the relative damage done by a truck to the highway is a material fact in the correct ascertainment of the contribution that should be made by it to the highway enterprise, that is not the only material fact. The operators of such vehicles are the small minority that engage in the extraordinary use—a use additional to that made by the people in general. But for this minority and the character of use that this minority make of the highways, roads could not only be maintained at a lower cost but the original investment would be smaller. Lighter construction would serve the purpose of the general class. It is to accommodate the minority that the larger investment is made in thicker and wider road surfaces. If, therefore, a truck operator contributes according to the damage he does still he does not bear his fair portion of the cost of the enterprise. He should contribute not to maintenance alone but also to cost of construction. And in fixing the amount of his contribution the fact must be kept in view that a substantial portion of the investment should be fully carried by the class to which he belongs.

I have referred to improved roadways as "public works." Let them be designated as "special facilities." (*Hendrick vs. Maryland,* 59 L. Ed. 385, 391). The State constructs them at the expense of the public. "The movement of motor vehicles over the highways *** is also abnormally destructive to the ways themselves. Their success depends on good roads, the construction and maintenance of which are exceedingly expensive; and in recent years insistent demands have been made upon the States for better facilities, especially by the ever-increasing number of those who own such vehicles." (*Hendrick vs. Maryland.*) "A further purpose (of the regulations) was to secure some compensation for the use of facilities provided at great cost from the class for whose needs they are essential, and whose operations over them are peculiarly injurious." (*Ibid.*) "There can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well

as domestic, it may exact compensation therefor." (*Ibid.*) "Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep." (*Clark vs. Poor,* 71 L. Ed. 1199, 1201.) Such tax may be imposed even though it may not all be used for maintenance and repair. (*Ibid.*) It may be "by way of a fee, payable annually or semi-annually, or by a toll based on mileage or otherwise." (*Kane vs. New Jersey,* 61 L. Ed. 222, 228.) The State "may impose a reasonable charge for the use of its highways by motor vehicles" employed in interstate commerce. (*Interstate Busses Corp. vs. Blodgett,* 72 L. Ed. 551, 554.) That case involved a Connecticut mileage tax. "It is true also that a State may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways." (*Sprout vs. South Bend,* 72 L. Ed. 833, 837.) When such a tax is imposed the courts will ascertain whether a forbidden burden is imposed on interstate commerce and for that purpose "may inquire whether the tax bears some reasonable relation to the use of the State facilities by the carrier." (*Corley & Hamilton vs. Snook,* 74 L. Ed. 704, 708.)

The above cases go far in their recognition of rules and principles upon which effective legislation may rest. Improved highways may be treated, in so far as the operators of motor vehicles are concerned, as "special facilities" for the use of which the operator may be required to pay.

Since the operation of machines over a highway endangers the safety of persons using the same highway, and since such operation is damaging to the highway itself, the State may impose exactions to cover the cost of police regulation and the cost of repairing the damage that the machine occasions.

Any tax or charge fairly imposed, in an amount that bears a reasonable relation to the value of the use of the special facility or to the damage estimated to be done by the operation of the vehicle will be upheld by the courts.

Such a tax or charge may be collected without regard to the character of the commerce for which a vehicle is used, that is, whether interstate or domestic. It only needs that no discrimination be found.

The amount of the charge or imposition may be influenced by the cost of enforcing regulations, the cost of maintenance and the cost of the original construction.

Since the amount of the tax must relate to the value of the privilege or the extent of the injury to the roadway

caused by the operation the legislature may classify the vehicles according to weight, size and damage-producing propensities.

And since the extent of the damage or the value of the use is one of the ruling factors in the fixing of a fair tax it necessarily follows that an important element that may be taken into account is the extent of the use, or the mileage.

A striking feature that is common to most of the State statutes reviewed by the Supreme Court of the United States is the disregard of *the extent of the use.* In many instances a license tax is imposed upon the truck and having paid this tax the truck may operate over the highways at pleasure. A truck that operates 100 miles pays as much as one that operates 1,000 miles. This disregard of the extent of the use in fixing the price of the privilege of operating vehicles on the highways is of special importance when we come to consider what should be paid for the right to operate commercial trucks of all kinds. The family-automobile variety of vehicles is used normally for short distances and short periods during the day. The truck is generally operated throughout the day and for long distances. It is in business, trying to make money.

The purpose of this article is to put on exhibition our $70,000,000 of road district bonds. These bonds rest like a fog over the real property in the State. It is worse than a fog; it is a lien more onerous than a mortgage. One class has used and consumed the roads; another class must pay the bonds. One class gets the benefits; another class carries the burden. The disaster has attracted little attention. The roads were built in the absence of regulations to conserve them. Construction and expenditure ran ahead of regulation. The State fell down on its job; the property-owners bear the consequences. The State has no program to relieve the victims of the experiment; is making no effort to correct the wrong. On the other hand the program is to use available funds for additional road improvement, leaving the property encumbered with the $70,000,000 to handle its burden as best it can. Not only is the State leaving the victims of these original bond issues in the lurch but it is not making full use of the lessons of the costly experiment. Public property in the shape of improved highways is still being constructed and left practically free to be destroyed by the operators that desire to use these public works as instrumentalities in their private business. The State can no more afford to furnish free improved highways, constructed at public expense, than it can afford to furnish free the vehicles themselves, or provide each mechanic with

a kit of tools, or each farmer with mules and plows, or pay one-half of the merchant's losses, or build his plant for the manufacturer, or buy his printing outfit for the newspaper man. Operators making an extraordinary use of the highways for business purposes were permitted to use the highways in which the $70,000,000 was invested. The result demonstrates the injustice of the program, injustice that amounts to crime. Will our legislature continue a program that requires a large majority of the public to provide roadways for a small minority; that requires our citizens and property-owners to contribute annually to a fund with which to furnish free public facilities to such as see fit to use them? Operators of trucks for private gain would not even consider building for themselves and for their own exclusive use a highway. In order to make their activities profitable they must have the highway furnished to them by the public. To this large extent their business must be subsidized. The public furnishes the roadway; the operator furnishes the vehicle. The one is as necessary as the other. Up to this time he has had the roadway furnished practically free. All he had to do was to provide the machine. The farm by the roadside carried its portion of the burden to pay for the roadway for the operator to use. The owner of the farm reaped no benefit from such operation along the highway. He was and is required to make his contribution to help the truck operator carry on the transportation business. It is worth nothing to the farmer to be able to see a big truck drive swiftly by with its load.

We have suggested a classification of vehicles that would put in one large class all the automobiles that are used for everyday, ordinary purposes. The persons in this class have the absolute right to use the highways. They make a pro rata contribution to the expense of construction and maintenance. If no other vehicles used the highways the problems would be simple as to the regulation of the use, the financing of construction and maintenance, the distribution of the burden. "There is a vast difference between the rights of a citizen to travel upon the highways and transport his property over them in the ordinary course of life and business and the right or privilege of one who uses the highway for his place of business and private gain." *Scott, Mayor, vs. Hart,* 128 Miss. 353, 357. In the same opinion of our court the further statement from an author is approved: "The former (referring to the right of a citizen to use the highways) is the usual and ordinary right of the citizen, a common right, a right common to all, while the latter (taxicab driver for hire), is special, unusual and ex-

traordinary. As to the former the extent of legislative power is that of regulation, but, as to the latter, its power is broader, the right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature." The right to use the streets or highways to conduct one's private business is not a natural right but is a privilege that must be acquired in the manner prescribed by law. Again, our court said, in the same opinion, referring to expressions from other courts, "They all recognize the fundamental distinction between the ordinary right of a citizen to use the streets in the usual way and the use of the streets as a place of business or main instrumentality of a business for private gain. The former is a common right, the latter an extraordinary use." And again, it is said that the right to use the streets for extraordinary purposes, that is, for private gain, is in the nature of a concession by the public. And hence the public, having the right, may let it be used on such terms as it sees fit to prescribe.

It is easy to see from the above that our $70,000,000 experiment came to disaster, and now looks like a crime, because certain fundamental principles were not recognized by appropriate legislation. The most important of these principles is that no man has the absolute right to use public property as an instrumentality in his private business. In other words, no citizen of this State, or of other States, has the absolute right to make use of our highways for transportation purposes except in the ordinary and usual course of business. This, we have seen, is true even as to the use of streets that are comparatively short, congested, and of heavy construction. For stronger reasons it is true of rural highways. In other words, one class of users has the absolute right to travel on the highway; another class has not this absolute right. Insofar as the latter class is concerned the right to use must be acquired as a concession. And in justice to all the users, those receiving the concession should be made to pay the value of it.

Our present regulations dealing with the class having the common and natural right to use the highways are reasonable and sufficient. Our regulations dealing with the class that make an extraordinary use of the highways, making them unsafe for ordinary users, damaging and destroying the highways, are insufficient and unfair.

Certainly the property owners carrying the burden of the $70,000,000 ought at least live to see that their sacrifice has not been in vain.

BANKS AND BANKING

INSOLVENCY

PREFERRED CLAIMS

By S. E. Travis*

This subject has been selected in quest of more light rather than with the view of enlightening our readers. Bank failures have been frequent in recent years and in cases of such insolvent institutions the question of "preferred claims" is constantly arising.

This article is intended simply to direct the attention of students and members of the profession to the subject with the hope that some one of them will have the time and inclination to prepare an exhaustive article for the next issue of the Law Journal.

The business of banking, like almost every other business, has been progressive. Methods and principles have changed to meet changing conditions. A most striking example of this will be found in the application of the principles supporting preferred claims. Hard and fast rules have gradually given way in the interest of equity and justice.

We must begin with the deposit or receipt by the bank and trace the claim from this source. Deposits were originally divided into two classes, general and special, and perhaps these two classes only remain, in a sense, but, as will be found as we proceed, many claims have been allowed with priority of payment which, strictly speaking, can not be classed as growing out of any sort of deposit. Such claims, however, have usually prevailed on the special deposit theory.

We shall examine briefly these two classes of deposits and then direct attention to the authorities supporting a few classes of preferred claims.

I.

GENERAL DEPOSITS

"A general deposit is a deposit generally to the credit of the depositor to be drawn upon by him in the usual course of the banking business."

3 R. C. L., page 517.

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"A deposit in a bank is presumed to be general in the absence of an agreement to the contrary. This is placed on the ground that such deposit is esteemed the most advantageous to the depositary and most consistent with the general objects, usage and course of business of banks."

3 R. C. L., page .....

"Money which is turned over to the officers of a bank without any request that it be kept separate from the other funds of the bank, which is entered upon the books as a general deposit and a certificate of deposit issued for the amount, and which is later withdrawn by check, has all the characteristics of a general deposit, and is entirely lacking in any of the essential elements of a special deposit. And money left with a bank for future investment which is entered and posted in the books of the bank the same as any regular deposit, and mingled with the funds of the bank, and for which the depositor receives an ordinary pass book, wherein the money is credited to him and charged to the bank, does not constitute a special deposit. A fiduciary may, as a general rule, deposit trust funds in a bank as a general deposit, and the fact that funds so deposited are trust funds does not itself make the deposit a special one. And an affix to the name of the depositor in a fiduciary character, such as the word 'trustee,' 'agent,' 'guardian,' 'administrator' or the like, does not itself render the deposit a special one as distinguished from a general deposit. Moneys deposited on an account kept in that form would be more readily traced, and the bank, perhaps, would be chargeable with notice of the source from which the depositor derived funds which he directed to be credited to him in that way. But the addition of such words does not operate to change the character of the deposit from a general to a special one. Thus money deposited in a bank by an executor to the credit of the estate of the deceased, subject to checks drawn by the executor in his official capacity, and without any promise on the part of the bank to keep the identical money and to return it to him, is not a special deposit, although made with the knowledge of the bank that the money is a trust fund held by the executor. Also a deposit is not special by reason of the fact that a certificate of deposit is given showing that it is made to secure the banker against a liability as surety of the depositor, where the latter knows that the money is mingled with funds of the bank. Nor is a deposit made special because an interest-bearing certificate of deposit is given the depositor."

3 R. C. L., page 518.

"In the case of a general deposit of money in bank the moment the money is deposited it becomes the property of the bank, and the bank and the depositor assume the legal relation of debtor and creditor. The bank is not a bailee or trustee in any sense of the money of the general depositor. It does not contract to keep on hand the particular money deposited, or to pay the depositor's checks out of it, nor is it expected to do so.

The moneys of such depositors are commingled with other moneys of the bank, the amount deposited is carried to the customer's credit in account with the bank, and payments made on his checks are charged to his account."

3 R. C. L., pages 519-521.

The rule is to the effect that a preferred claim never arises out of a general deposit.

"The relation between a bank and a depositor is simply one of debtor and creditor and the deposit is not a trust fund nor does the bank have a lien thereon for the payment of a depositor's note."

114 Miss., page 203. (Syllabus)

II.

SPECIAL DEPOSITS

"A special deposit is a deposit for safe keeping to be returned intact on demand, or for some specific purpose not contemplating a credit on general account."

3 R. C. L., page 517.

A special deposit must be created by contract, express or implied.—3 R. C. L., page 517, cases, note 14; *Bryan vs. Bank,* 132 So. Rep. 481.

"In the case of a special deposit, the bank assumes merely the charge or custody of property, without authority to use it, and the depositor is entitled to receive back the identical money or thing deposited. In such case, the right of property remains in the depositor, and, if the deposit is of money, the bank may not mingle it with its own funds. The relation created is that of bailor and bailee, and not that of creditor and debtor. Thus, the depositor may always guard against the effect of an insolvency of the institution by making a special deposit; that is, by depositing his money in a bag or box, or by affixing some mark upon it by which it can be distinguished from the general funds of the institution. If he does so, the bank has no right to make use of it, and officers or agents who convert it to the general purposes of the institution, without the consent of the depositor, make themselves personally liable for the same. The depositor may also follow the money into the hands of third persons who received it with a knowledge of his rights, or who have not paid an equivalent therefor in the ordinary course of business."

3 R. C. L., page 522, par. 150.

The two classes of deposits referred to involve many other principles and applications to varying circumstances, but the foregoing is deemed sufficient basis for what shall follow.

III.

PREFERRED CLAIMS

In some of the States, including our own, public funds deposited in a bank or public depository, either in individual

or official capacity, are expressly impressed with a trust as against the creditors of the bank or the official making the deposit, and we need not, therefore, deal with this class of preferred claims.—Miss. Code, 1930, sec. 2914.

1. The general rule is to the effect that special deposits, strictly speaking (that is, where the deposit is for safe keeping to be returned intact or for some specific purpose not contemplating credit on general account) always gives rise to a preferred claim. We need not, therefore, pursue this character of deposit.—7 C. J., page 749, sec. 544; *Carilson vs. Kies,* 47 L. R. A., (N. S.), 317.

2. Deposits for specific purposes give rise to many classes of preferred claims. Examples of such deposits, namely: (a) deposit to await the fulfillment of contract, (b) deposit to await the outcome of litigation, (c) deposit for closing sale, (d) deposit for payment of debt to third person, (e) deposit for transmission to third person, and (f) deposit as security; are given in note to the case of *Hudspeth vs. Union Trust & Savings Bank,* 31 A. L. R., page 468. See also, to the same effect: *People, etc. vs. State Tax Commission,* 57 A. L. R., 374, note; *Bank, etc. vs. Duke,* 39 A. L. R., note, page 930; *Blythe vs. Kujawa,* 60 A. L. R., 330; *Sawyers vs. Conner,* 114 Miss., 363.

The following is quoted from the syllabus of the last named case:

"Where a depositor in a bank refused to permit the proceeds of a check to be deposited either to her checking account or her savings account but informed the cashier that the deposit was for the purpose of paying a contractor for building a house, whereupon the cashier gave her a special receipt bearing the words 'S. P. Dept.' In such case the deposit was a special deposit, and the money was charged with a trust in favor of the contractor, and the bank did not take title to the proceeds of the deposit."

Sawyers vs. Conner, 114 Miss., 363 (Syllabus).

A preferred claim may arise out of a remittance to a bank by one who is not a depositor for payment of some designated obligation. In such case, it cannot be said, strictly speaking, that such remittance is any sort of deposit. But the authorities seem to treat such remittance in the nature of a deposit for a specific purpose. The following authorities are illustrative of the rule here under consideration:

"A deposit may be for a specific purpose, as where money or property is delivered to the bank for some particular designated purpose, as a note for collection, money to pay a particular note or draft, etc. While such a deposit is sometimes termed a 'special deposit' and partakes of the nature of a special deposit to the extent that title remains in the depositor and does not pass to

the bank, yet it seems more accurate to look on this as a distinct class of deposit. In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor, and, if it should fail to apply it at all, or should misapply it, it can be recovered as a trust deposit."

7 C. J., pages 631-2, par. 307.

"The relation of principal and agent existing between a bank receiving for collection an item from another bank, for which it takes checks upon itself, is not changed to that of debtor and creditor so as to defeat a preference in event of insolvency of the collecting bank, by the fact that it attempts to remit by cashier's check instead of sending cash."

"The acceptance by a bank of checks drawn upon itself in payment of an item sent to it by another bank for collection constitutes it a mere bailee, with the sole duty of remitting the proceeds to its principal, the one who forwarded the item, and the relation of debtor and creditor does not arise out of the transaction where there are no reciprocal accounts existing between the banks."

"To prevent fraud equity will give rise to a constructive trust in favor of the owner of an item sent to a bank for collection when the bank accepts checks upon itself in payment thereof."

Skinner vs. Porter, 73 A. L. R., 59-60 (Syllabus).

"A depositor who sends to his bank a check with directions to apply the proceeds to the payment of interest on bonds which are shortly to mature, and are payable at the bank, thereby creates a special deposit of the amount of the check, which entitles him to preference in case the bank becomes insolvent before the interest is paid."

Lumber Co. vs. Bank, 39 A. L. R., 922 (Syllabus).

3. Another class of preferred claims sometimes arises where officers of a bank receive funds knowing of its insolvency. The following authorities are illustrative of this rule:

"Where bank is hopelessly insolvent and receives deposit with knowledge of insolvency and fails, there is such fraud on depositor that he may rescind contract of deposit and reclaim amount deposited, or its proceeds, if traced into assets of bank going into hands of receiver."

Holloway vs. Dykes, 29 Fed. (N. S.) 430 (Syllabus).

See also, 12 U. S. C. A., p. 299, note 62.

"Where a bank, being hopelessly insolvent, receives a deposit with knowledge that it cannot pay its debts and must fail in business, the depositor may rescind for fraud and reclaim the deposit or its proceeds, if traced into the assets of the bank coming into the hands of the receiver."

Brennan vs. Tillinghast, 201 Fed., 610 (Syllabus).

4. Funds received by a bank as trustee or under circumstances where a trust is implied by law, usually par-

take of a trust nature and may be recovered as a preferred claim in case of insolvency. The following authorities support this view:

"Money held by a bank as trustee is not part of its assets, nor legally subject to claims of its creditors."

Spokane Co. vs. Clark, 61 Fed., 539 (Opinion).

See also:

12 U. S. C. A., sec. 194, note 41, p. 297.

12 U. S. C. A., sec. 248 (k), p. 319.

"Where sight drafts attached to bills of lading were delivered to a bank for collection and remission of proceeds, the relation of trustee and cestui que trust was established between the bank and the owner of such proceeds, which might be followed, on the bank's insolvency, into the hands of its receiver, if they could be traced."

American Can Co. vs. Williams, 178 Fed., p. 420 (Syllabus).

But see to the contrary,

Love, etc. vs. Federal Land Bank, 157 Miss., 52.

IV.

TRACING THE TRUST RES.

The general rule of law as applied to the various classes of preferred claims referred to is to the effect that the trust fund must be traced into the insolvent institution either in its original or some changed form. There are authorities to the effect that a preferred claim growing out of a trust relation is a lien upon the funds in the trust department only of the insolvent institution, while other authorities seem to hold that such lien extends to all of the assets of such institution. For the sake of brevity, we shall simply direct attention under this subdivision to a few of the authorities dealing with these various phases of preferred claims.

The case of *Richardson vs. N. O. D. R. Co.,* 102 Fed. 780, touches upon the tracing of funds in such case. The following is quoted from the syllabus of this case:

"Where a bank receives a deposit on the day of its suspension, when it is known by its officers to be insolvent, and mingles the money with its own funds, which, to an amount larger than the deposit, pass into the hands of a receiver, it is not essential to the right of the depositor to recover his deposit from the receiver that he should be able to trace the identical money deposited into the receiver's hands, but it is sufficient that the amount which went into his hands was increased by the amount of the deposit."

The concluding sentence of the opinion of the court in this case is as follows:

"So, we think, if one's money is wrongfully mingled with a

mass of money, that equity can direct the possessor and wrongdoer, or his successor, to take out of the mass a sum sufficient to make restitution."

The later case of *Brennan vs. Tillinghast,* 201 Fed., page 609, is to the same effect. The following is quoted from the head notes thereof:

"Proof that a tort-feasor has mingled trust funds with his own and made payments thereafter out of the common fund, in the absence of anything else appearing, is a sufficient identification of the remainder of that fund coming into the hands of the receiver not exceeding the smallest amount the fund contained subsequent to the commingling as trust property, under the presumption that the trust moneys had not been paid out."

The very late case of *Myers vs. Federal Reserve Bank,* 134 So., page 600, is to the same effect, as appears from the following quotations from the head notes thereof:

"Collection items charged to depositor's accounts by collecting bank must be regarded as having passed to receiver, where collecting bank closed before payment of draft by which it attempted to remit to correspondent."

"Where insolvent bank's assets were increased by retention of collection items attempted to be remitted by draft which was not paid, drawee of remittance draft had preferred claim against fund from which draft was attempted to be paid."

The Skinner case, before referred to, touches upon the extent to which the preferred claim is a lien upon the assets of the insolvent institution, as indicated by quotations from the syllabus thereof, as follows:

"When the funds turned over to the bank commissioner by an insolvent bank are less than the amount of a trust fund in its possession, the cestui que trust is entitled to the whole amount turned over if no lower balance was reached after the trust arose and before the funds were turned over."

"When a trust fund in the hands of an insolvent bank is less than the cash turned over to the bank commissioner, the cestui que trust becomes a general creditor for the balance of his claim."

Skinner vs. Porter, 73 A. L. R., 59-60 (Syllabus).

We trust that the foregoing may serve as introductory to the kinds and character of deposits coming into banks, and to the classes of claims which are preferred with priority of payment over general creditors, in cases of the insolvency of such institutions.

Who will give us more light on these live, engaging subjects?

SOME OBSERVATIONS ON STATUTORY RULE AGAINST PERPETUITIES

By J. E. Holmes*

After prohibiting estates in fee tail and converting a fee tail into a fee simple estate, the new Mississippi statute prescribes a new statutory rule against perpetuities. The old "Two Donee Statute" is repealed, and that statutory "venerable relic of antiquity" is wisely stricken from our law. The writer thinks that the old statute, as construed by the courts, has long since outlived its usefulness, and no doubt the Profession welcomes the new statute.

Under the new statute, any person may make a conveyance or devise of lands to any number of successive donees then living "and upon the death of the last of said successors to any person or any heir" (Sec. 2117 Code 1930). There can be little difficulty in the construction of that part of the new statute which permits a devise or conveyance to any number of successive living donees, but the last clause of the statute may be the occasion for some difference of opinion as to its exact meaning. It would perhaps be well to state the common law rule, which is changed by the statute. The statute, being in derogation of the common law, is to receive a strict construction. The best statement of the common law rule which we are able to find is made by Mr. Gray, as follows:

"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."(Rule Against Perpetuities, Gray, 3rd Ed., Sec. 201).

Concerning the new statute and its operation, the writer is pleased to submit, for the consideration of the Profession, the following observations:

1. The common law rule applies to personalty as well as land, and also to legal and equitable estates. The statute, of course, has no application to personal property (*Thomas vs. Thomas,* 97 Miss. 713), but does apply to any interest in land, whether legal or equitable. Neither did the Two Donee Statute apply to personal property. The legislative policy seems to be not to restrict the common law rule insofar as personal estates are concerned, as the public policy of the State seems to be only against prolonged entailments of real estate.

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2. Neither the old nor the new statute is a *formula for conveyancing.* The purpose of the statute is to prescribe the time limit beyond which the vesting of the estate in fee could not be suspended, the statute is prescribing a *limit of time,* and the time limit under the statute is now during a life, or lives, in being. (*Middlesex Banking Co. vs. Field,* 84 Miss. 662.)

3. Therefore, the fee must ultimately vest at or before the death of the last living successive donee, and the vesting of the estate in fee cannot be suspended beyond that time.

4. While the statute speaks of the devise or conveyance "to a succession of donees then living," it does not necessarily follow that there may not be an intervening limitation to persons not in being at the time the devise or conveyance is made. This must be true, because the common law rule had no application to vested interests. For instance, the donor may make a conveyance or devise successively to his son A for life, and on his death to his son B for life, and on the death of B to B's children for life, and on their death to C, the third son of the donor. If B had no children living at the time of the donation, still the limitation over to C would be good, because C is a person in being and has a vested estate. Even the common law rule has no application to vested interests; and in the respect mentioned it is not thought that the common law rule has been changed. (Gray Rule Against Perpetuities, 3rd Ed., Sec. 205.)

5. Under the new statute, the ultimate limitation may be "to any person or any heir." It is a question whether the word "heir" means that the ultimate limitee shall be an heir of the donor or may be the heir of any person. It is submitted that the statute means the latter, since the ultimate limitation may be also to any person. However, such person or heir must be in being on the death of the "living donee," otherwise there cannot be a vestiture of the fee at that time.

6. If the ultimate remainder is limited to a class, then the class must close during the lifetime or at the death of some living donee. Otherwise the ultimate limitation to the class might be held to be void. If the devise is not to vest in the members of the class until a period of time which is too remote, then the devise to the whole class might be held to be bad. (Gray, supra, Sec. 373.)

7. It is well to remember that the statute is not dealing with Restraints on Alienation. The statute is dealing only with the doctrine of remoteness; and the statute does not

authorize a suspension of the power of alienation. Unconditional restraints on alienation of purely legal estates are still bad as at common law. Of course, it is permissible, as has always been the case, to make a limitation over on attempted alienation; and, of course, there may be certain restraints against the alienation of certain equitable interests, such as a spendthrift trust (*Leigh vs. Harrison,* 69 Miss. 923.)

8. Therefore, the only change made by the new statute of the common law rule is the elimination from that rule of the twenty-one year period after the death of some person living when the conveyance or devise is made. It follows, within the limits fixed by the statute, a grantor or devisor has the utmost of freedom.

SOME SIMPLE IMPROVEMENTS IN PRACTICE

By Julian C. Wilson*

There are, of course, the best of reasons for being very conservative in making legislative changes in substantive law.

Documents are drawn, business is conducted and contracts are made with reference to existing rules of law. On this account it takes a great deal of time for people to adjust themselves to new rules, and therefore changes produce more or less confusion.

Changes, however, are met much more easily when they have reference only to the methods of conducting litigation. It therefore seems that changes in the rights of individuals and property should be slowly made, while changes in practice and procedure should be made whenever necessity points the way.

There are a great many time honored rules governing the practice of law which have outlived their usefulness. They should be corrected and improved.

England, from which we got the sources of our procedure, has not hesitated to modernize its practice. It seems that we might well follow its example, insofar as the conditions are alike. Our procedure might be simplified with reference to all of the courts with a resulting economy both of time and money.

The most vital necessity in the Supreme Court is, of course, the creation of another judgeship so that cases will not be affirmed with three judges holding one way and three judges the other. This change can only be made by constitutional amendment and of course that, at least, is not easily done and is therefore not simple in that sense. Sooner or later this change will have to be made and when it is made it would be well to provide additional changes so as to constitute one branch of the court a branch for criminal appeals.

There are other improvements, however, which are simple in character and would tend to prevent delays. In the appellate courts, as well as the courts of first instance, it is a mere waste of time and a cause for delay to have process returnable to a fixed term of court. It is thought that all process, pleadings and briefs should be answerable

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or be filed within a given number of days after a certain time. Thus a declaration or bill should be answered within, say, twenty days after process; a record should be filed within forty days after the appeal is perfected; a brief with assignment of errors ought to be filed within, say, ten days.

The net results of such procedure would be that instead of waiting for a given time each lawyer would be required to make his reply or file his brief within a reasonable time after he had received effective notice to that effect, and then the cases should be placed on the hearing dockets. Pleadings would be made up and the briefs all filed under a practice of this sort before a case was called for trial and it seems certain that much delay would be avoided.

In the matter of making up records for the Supreme Court, the simplest of changes would effect much saving of time, effort and money. All papers in Circuit or Chancery Courts should be required in duplicate, on uniform paper, and should be preserved by flat filing, just as the records are now made up. It would be a very easy matter to have one of these duplicates bound and sent to the Supreme Court as a record, thus saving the time, work and effort of transcribing records on appeal. The present method is a mere waste of time and money and carries with it the danger of incorrect transcription, or a strict comparison of the record to avoid mistakes in copying it for the Supreme Court.

CIRCUIT AND CHANCERY COURTS

The vital improvement necessary here is far from simple of accomplishment, although simple in character. It is only respect for the hoary traditions of the past, together with the lawyer's natural adherence to accustomed methods, that preserves the distinction between law courts and equity courts. A natural division is that between civil and criminal courts.

Considerable experience has led to the belief that there should be separate civil and criminal courts. The trial of civil cases at criminal terms leads to congestion of the dockets on some days, while there is not enough to do on other days. Witnesses are kept in attendance in civil cases for the call or hearing of criminal cases, and vice versa, and the mixture of the two sets of causes is unhealthy and unnatural. It is believed that there should be a criminal court with facilities for prompt convening in all necessary emergencies. In addition, it would be best to clothe this court with exclusive jurisdiction in divorce cases, juvenile

cases and all matters of domestic relations. Such a change should be accompanied by an abolition of all the restrictions of holding one term of court during the time provided for another, so as to make it easy for the criminal judge to have prompt, regular and ample sittings of the court for the disposition of criminal business and matters involving domestic relations.

On the other hand, the civil courts should handle both law and equity cases, with facilities for jury trials where they are necessary.

It would simplify procedure of civil courts very much if jury trials were only granted where demanded in the pleadings, and if separate sessions could be held by the judge for jury cases only.

There are a great many cases where the parties are not much concerned about whether their cases are tried by judge or jury. If an extra cost of about $25.00 were added for jury trials and jury trials were not granted unless they were demanded in the pleadings, the time of the juries would be taken up in fewer cases. It is safe to say that the jury expense and the expense attendant on having juries in court could be cut in half by some such device. At the same time the right of every litigant to a jury would be fully preserved.

Litigation would also be much simplified in the Circuit Court if the parties were required to plead as they do in the Chancery Court. A plea of the general issue or a general traverse really does nothing to bring the litigation to a debatable point. It merely challenges the plaintiff's case. Under the present system a plaintiff whose pleading has been generally traversed must be prepared to prove every averment of the declaration, even though there is but one point in dispute. This brings into court a needless number of witnesses and takes up the public time listening to evidence on matters which are not controverted. If, on the other hand, each allegation not denied were considered admitted, the matters in issue would be reduced to a very small number and the public time conserved. In addition, all pleadings should be sworn to, at least on information and belief. A party ought not to trouble the court with litigation where he was unwilling to make an oath on belief to his claim or defense. Allegations and denials would, however, be made more sparingly if made under oath. The danger of being confronted with a false affidavit would make the parties more careful in their averments or denials.

Some provision might also be made for taxation of costs

on distinct issues raised, with no proof offered to support the issues.

The Justices of the Peace are no longer needed. Improved methods of transportation have made it easy to get from any part of a county to the county seat in a very few hours. The judgment of a Justice of the Peace means practically nothing. The system should be abolished and there should be substituted the county courts with liberalized jurisdiction and with appeals direct to the Supreme Court. In fact, every method of simplification in practice should be enacted. It is not enough that it has been the habit to do a thing one way, to keep doing it that way. It is only desirable to preserve the present methods where they are the best methods. The best methods are in nearly every instance the most direct and simple.

The writer believes that trained men can adjudicate rights and issues better than untrained men. Therefore a lawyer should preside instead of a layman and the Justice Courts be put in the discard. He believes that instead of dividing the courts into law courts and equity courts they should be divided into criminal courts and civil courts, but that the criminal courts should have charge of divorce, domestic relations and juveniles.

He thinks that civil courts should be divided into non-jury calendars and jury calendars, and that jury calendars should only exist on demand and then in only non-complicated cases. In other words, that matters of account and the like should not be submitted to juries, but to masters, or auditors. He believes that pleadings and briefs should not be required with reference to terms of court, but with reference to the occasion for filing them. He feels sure that justice would be more readily administered if the judges were given more facilities for holding terms of court and disposing of the business, rather than be bound to fixed times, although, of course, fixed times must be provided.

Experience has taught that it is utterly unnecessary to transcribe records for the Supreme Court and to hedge an appeal about with anything more than ample opportunity for review and argument.

The Supreme Court should sit in divisions, but it should consist of an unequal number of members to prevent tie votes. A method should be provided whereby the chief justice or other members of the court would review all opinions to prevent the decisions being in conflict.

Administering justice should be changed to conform to the changed conditions of life, to the spirit of the age and to the necessities of the times.

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NOTE AND COMMENT

IMPLIED WARRANTY: TORTS: LIABILITY OF THE MANUFACTURER TO THIRD PERSONS FOR THE NEGLIGENT MANUFACTURE OF CHATTELS.—Ordinarily, if we seek to impose any legal responsibility on the manufacturer toward third persons, unless there is some fraud or concealment present, it must be based either on the grounds of an implied warranty or on the grounds of negligence. With the exception of cases involving food, most courts hold that no warranty runs from the manufacturer to an ultimate purchaser.[1] This rule is based on the theory that in order to have a warranty there must be a contractual relation. In its early development, the implied warranty sounded in tort, and an action can still be brought in this way in some courts. In many cases, breach of the implied warranty is more of a tort than a breach of contract because the parties never intended the relation into which the law forces them. If we could consider breach of the implied warranty as a tort, there would be no difficulty in extending this warranty to persons not in privity of contract.

A warranty might possibly be allowed to third persons because of labels.[2] The seller of a chattel might assign his rights to sue the original vendor for breach of the implied warranty, but his sale of the chattel does not operate as such an assignment.

There is a class of cases which is fixing itself in the law as an exception to the general rule that an implied warranty does not run with the sale. These cases hold that the manufacturer of articles for human consumption impliedly warrants their quality to the ultimate purchaser.[3] The protection of public health fully justifies this exception. If the implied warranty from the manufacturer to the ultimate purchaser were extended to the sale of other articles, the burden on the manufacturer would probably be too great. Though it might be argued that the loss of the individual would be distributed among the consuming public as an incident of the cost of manufacturing.

The general rule that the manufacturer is not liable to third persons for negligence in the construction of an article is based on an incorrect interpretation of *Winterbottom vs. Wright*, 10 M. & W. 109. The declaration in this case sounded in contract not in tort, and the case has been accepted as authority in the field of torts. Judge Sanborn set forth the general rule in "*Huset vs. Case Threshing Machine Co.*," 61 L. R. A. 303: "The general rule is that a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence is the construction, manufacture, or sale of the article he handles." Three well established exceptions to the general rule are: (1) A person who deals with an imminently dangerous article owes a duty to exercise care toward those who may be endangered. (2) A person who knowingly sells an article which, by reason of defective construction or otherwise, is imminently dangerous to life or property without notice or warning is liable to the parties who suffer therefrom. (3) Where one

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1 *Welshausen vs. Charles Parker Co.*, 76 Atl. 271.
Pease & Dwyer Co. vs. Somers Planting Co., 93 So. 673, 107 Miss. 848.

2 Williston on Sales, section 244.

3 *Rainwater vs. Hattiesburg Coca-Cola Bottling Co.*, 95 So. 444, 131 Miss. 315.

undertakes with another to construct a place for doing certain work, such as a scaffold or staging, he will be liable to any who, while using the place in the performance of such work, are injured by reason of negligence or defective construction.[4] The reason usually given by the courts to support the general rule is that the chain of causation is broken by the conscious acts of the first purchaser. This reason is based on a mistaken idea of causation. Though the acts of the first purchaser are conscious, they do not break the chain of causation, if, as is usually the case the acts might reasonably be expected by the manufacturer.

The exception which includes imminently dangerous articles has been subjected to great strain. One court declared a coffee urn imminently dangerous[5], and soap has twice been declared so.[6] It is hard to see why some articles are classed as exceptions, and others equally dangerous are not included. The courts have held the negligent manufacturer of hair tonic liable to the ultimate purchaser, but have refused to extend this liability to the negligent manufacturer of boilers. If the sale of hair tonic does not break the chain of causation and destroy liability, the sale of boilers should not do so. In order to do justice, the exceptions have been stretched in some cases beyond all reason, thus greatly confusing the law.

The minority view, which seems to be based on sounder reason, is found in "*MacPherson vs. Buick,*" 217 N. Y. 382. Here the defendant auto manufacturer was held liable to the ultimate purchaser for the injury caused by a defective wheel which he negligently placed on the car. The court did not try to place this case in one of the classes of exceptions, but based the liability on the fact that the negligence toward the plaintiff's life was the proximate cause of the injury. Judge Cardozo said, "If the nature of a thing is that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. It is possible to use almost anything in a way that will make it dangerous if defective. If to the element of danger there is added knowledge that the thing will be used by other persons than the purchaser, and used without new tests, then irrespective of contract the manufacturer of this thing of danger is under a duty to make it carefully. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the transaction. The proximateness or remoteness is a factor." This decision is based on ordinary principles of tort liability.

In the case of "*Pillars vs. Reynolds Tobacco Co.,*" 78 So. 365, the subvendee was poisoned by a decayed toe left in the tobacco by the manufacturer. The Supreme Court of Mississippi held that they would not try to base liability on one of the recognized exceptions to the general rule, but would take a step forward to protect public health. An article in 32 Harvard Law Review 89 took this to mean that Mississippi had decided to make the duty apply to all manufacturers whose negligence threatened the health of persons. Whatever this case may have meant, "*Ford Motor Co. vs. Meyers,*" 117 So. 362, 151 Miss. 73, settled the rule that the negligent manufacturer of chattels which are not intended for human consumption, is not liable to third persons for negligence

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[4] Torts, Cooley 1488.
[5] *Statler vs. George Ray Mfg. Co.*, 88 N. E. 1063.
[6] *Hasbrouck vs. Armour & Co.*, 121 N. W. 157.
Armstrong Packing Co. vs. Clem, 151 S. W. 576.

unless the chattel is dangerous per se or unless there is some fraud or concealment.

In this case, "*Ford Motor Co. vs. Meyers,*" the deceased was killed because of a defective cuff on the car which the defendant had manufactured. The deceased, being the sub-vendee, had no contractual relation with the defendant. It was alleged in the declaration brought by the deceased's relations that the defendant had negligently manufactured the auto, an instrumentality which is dangerous unless carefully made. The Supreme Court in reversing the decision of the lower court held the defendant was not liable for his negligence toward the plaintiff.

The tentative draft of the "Restatement of the Law of Torts" favors the minority view by holding in the following words, "A manufacturer of chattels which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those to whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured." This view seems more just and easier in application than the rule laid down by Judge Sanborn.

The liability of the manufacturer for his negligence to third persons, though it is just as applicable to property as it is to persons, is not extended to property rights, nor will it be extended to these rights for some time.[7] This is because the exceptions in the older rule of non-liability grew out of cases in which the chattels were imminently dangerous to human life.

Ordinarily, there can be no liability in Mississippi on the part of the manufacturer of chattels toward third persons if the manufacturer does not know of the defect, unless the article is for human consumption or unless it is imminently dangerous to human life.

NELSON CAUTHERN.

MISSISSIPPI'S PARRICIDE STATUTE.—Mississippi has two very similar statutes dealing with the same subject, INCAPACITY OF A PARRICIDE TO INHERIT. One of these statutes, Section 1413, Code of 1930, comes under the Chapter on Descent and Distribution and reads as follows: "*A person who has killed another not to inherit from him.*—If any person wilfully cause or procure the death of another in any way, he shall not inherit the property, real or personal, of such other; but the same shall descend as if the person so causing or procuring the death had never been in being." The second section above referred to is Section 3566, Code of 1930, and is the last section in the Chapter on Wills and Testaments. Its contents are as follows: "*A person who kills another not to take under his will.*—If any person shall wilfully cause or procure the death of another in any manner, he shall not take the property, or any part thereof, real or personal of such other, under any will, testament, or codicil; any devise to such person shall be void, and, as to the property so devised, the decedent shall be deemed to have died intestate. But this shall not defeat the title of a bona fide purchaser for value of the property so devised, who acquired the same after one year from the probation of the will, without notice that the person to whom the same was devised so caused or procured the death of the testator."

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[7] 20 Mich. 364, 131 N. E. 454; but see *Skinn vs. Rebutter*, 97 N. W. 152.

There has never been occasion for an application of either of these statutes so far as I have been able to ascertain. However it is well to consider them and to venture a suggestion as to what would be their effect when the occasion for their application to a state of facts arises.

A review of the cases involving the legal effect of felonious homicide upon the title claimed by the slayer to the property of the deceased discloses three lines of argument:

(1) The legal title does not pass to the Murderer as heir or devisee; *Riggs vs. Palmer,* 5 L. R. A. 340—N. Y.

(2) The legal title passes to the murderer and may be retained by him in spite of his crime; *Re Carpernter's Estate,* 170 Pac. 203.

(3) The legal title passes to the murderer, but equity will treat him as a constructive trustee of the title because of the unconscionable mode of its acquisition, and compel him to convey it to the heirs of the deceased, exclusive of the murderer; *Perry vs. Strawbridge,* Mo., 16 L. R. A. New Series 244; Ames Lectures on Legal History, 311.

Which of the above views will be adopted when a case under these statutes comes up before our Supreme Court we will now consider. Only a few other states have statutes similar to those of Mississippi. Kansas and Iowa have enacted statutes which are similar in some respects. Other states, lacking the statutes have held that it is contrary to Public Policy to allow a Parricide to inherit from the ancestor whom he has murdered, and adopt views 1 or 3 above. To a student of the law it would appear just that with or without statutes the Parricide should not be allowed to profit from his own wrong, and it was so held in the case of *Riggs vs. Palmer* decided in 1889 by the New York Court of Appeals. Elmer Palmer was the grandson and principal legatee of Francis B. Palmer. The testator had expressed the intention of revoking his will. In order to prevent this Elmer wilfully murdered him, using poison. An injunction was granted to the plaintiffs, other legatees under the will, restraining Elmer from using any of the property left to him under the will. It was held that the maxims of the common law, "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime," applied and prevented the murderers taking under the will. It is said that these maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries and have nowhere been superseded by statutes. They are based on the civil law, evolved from the general principles of natural law and justice. "By his crime, the defendant made the will speak. By his own wrong he gives it force and effect. He shall not be permitted to profit by his own crime."

The second line of argument, that the murderer may retain the legal title in spite of his crime, could not apply in view of our statutes. This view was adopted however in the Carpenter Case decided in 1895 by the Pa. Supreme Court. The argument set forth by Green, J., is as follows: "It is argued that it is contrary to Public Policy to allow a Parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute pre-

scribes that upon the death of a person his estate shall vest in his children in the absence of a will, how can any doctrine, or principle, or other thing called Public Policy, take away the estate of a child and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory, and the estate cannot be diverted from those persons and given to other persons without violating the statute. There can be no public policy which contravenes the positive language of a statute.''

In considering the third line of argument we find an eminent writer saying, ''Where a testator by his will devises property to another, it is a reasonable and permissible construction of the will to hold that the devise was upon the implied condition that the devisee should not murder the testator, for manifestly such was the intention of the testator. Therefore, when the devisee murders the testator, there is a breach of the implied condition upon which the devise was made, and the devisee will not be permitted to take the gift.''—*Page on Wills*, Sec. 687. In the case of *Wellner vs. Eckstein*, decided by the Supreme Court of Minnesota, in 1908, John Wellner was murdered by his wife and a hired man. They were convicted and sentenced to life imprisonment for the murder. Eckstein became the purchaser from Mrs. Wellner with knowledge of all the facts. Wellner's minor children sue to have the defendant declared trustee ex maleficio of his property. The opinion adopts the views of the plaintiffs and says: ''The widow never inherited any estate whatever. In the probate court proceedings the facts were unknown and the widow was permitted to receive the benefit of the statute of descent and distribution. She thereby acquired an apparent title to real estate which in fact belonged to her children. The legal title passed to the widow but she obtained the title by fraud and crime, and a court of equity, acting in personam, should deprive her of the fruits of her crime. On the death of Wellner, the title to his real estate passed to his heir; but Mrs. Wellner took the title subject to whatever defects existed therein and subject to such limitations thereon as grew out of the fraudulent and criminal methods by which it was acquired—The naked legal title subject to the power of a court of equity to deprive her of its beneficial use and require its conveyance as justice and equity demand.''

It is probable under our law that were the parricide to acquire title to the property of the ancestor whom he had murdered by reason of the fact that such murder was not known, a court of equity upon proper application would declare him trustee ex maleficio. If a conviction for murder were had against the parricide then the property would descend as though he had never been in being, and the property would pass to the executor and the other heirs.

J. G. SMYTHE, JR.

RECENT IMPORTANT DECISIONS

ADMISSIBILITY OF ORAL TESTIMONY TO AVOID THE TERMS OF A WRITTEN CONTRACT.—Parol evidence is not admissible to vary the terms of a written contract, but is admissible to show that through fraud, deceit, misrepresentation or mistake, there has been no meeting of the minds of the contracting parties and that, therefore, there is no contract in existence.—*McElroy Motor Co. vs. Raynor*, 131 Southern 832.

It is not the purpose of this comment to report the case cited above, but to show that the Supreme Court, through a misunderstanding of the facts, or a misapplication of the law to the facts, has arrived at a decision in this case that is both contrary to law, and violative of the principle of stare decisis.

The opinion of the court is not to be found in the State Reports, for the reason that the case was merely affirmed without an opinion, so that we cannot follow the court's trend of thought. We can know, only, that our Supreme Court adopted the rulings of the Circuit Court, and that the lower court gave a peremptory instruction for the plaintiff upon the principle, wholly inapplicable to the facts of the case, that the law holds so sacred the terms of a written contract that it will not allow them to be violated, changed, subtracted from, or added to, by permitting the introduction in evidence of oral testimony to show what the terms of the contract actually were.

The principle is a sound one. Without it there would be no more security in reducing agreements to writing than there is in allowing them to rest, unwritten, in the minds of the contracting parties. But sound law is often misapplied; sound principles carried farther than they should be carried. Its misapplication here lays down new law, reverses the latest previous decisions of the Supreme Court on this question, and, by mistake, lays down a principle that it is not the purpose of that court to establish. The principle is this: A written contract is final and culminative. When parties to an agreement put what they believe to be their agreement in writing, the writing represents the agreement finally, and completely. If through the fraud of one of the parties, the other is led into an agreement which he did not intend to make, it makes no difference. Fraud, deceit, misrepresentations have no effect. Such a principle, which was surely not intentionally laid down by the court, will certainly die a death of disuse, or later will be disclaimed.

In order to magnify the error of both the Circuit Court and the Appellate Court, let us shortly survey the facts of the case:

J. H. Raynor, defendant below, bought in September, 1929, of the appellee, a Chrysler automobile, giving as cash payment an old car valued at $500, and received at that value, and executing a sales contract and note for the balance of about $900. The seller had Raynor sign a statement as part of the deal, which statement was in the nature of a proposal for the trade, and a statement of the financial condition of the buyer, his income, etc. The proposal states that the car to be bought is a NEW CHRYSLER.

The sale was consummated at night, at the place of business of the plaintiff below, and the buyer states that he could not see or could not tell much about the car, but that the salesman repeatedly told him the car was

new, and the buyer said several times that he wanted a new car, not an old one. He further states that before he got to the camp that night, he "knew he was beaten." He testified, also, that next day he saw the casings were badly worn and discovered that the extra tire, which was covered with a tire cover, was blown out; that the car he traded in was worth as much as the one he received as a new car. He further stated he relied on the salesman as being an honest man, and took his word for the car's being new.

Appellant offered testimony of expert automobile men to show that the car had been driven from five to ten thousand miles, and was a used car. It was also shown by the defendant below that the speedometer on the car was connected up after Raynor bought it, and registered no mileage.

In the lower court, Raynor, being sued for the purchase price, pleaded the general issue, and gave notice that he would offer testimony to show that he had been defrauded. When he sought to introduce such testimony before the court, it was promptly excluded by that court on repeated rulings as being incompetent. The court gave a peremptory instruction for the plaintiff.

The case which should have been decisive of the facts here is reported in 125 Southern 708 and in 156 Mississippi 157, styled, *Nash Mississippi Valley Motor Co. vs. Childress.* The decision in that case is the last expression of our court on the principle before us. Not only is the principle involved identical with that of the case under discussion, but the facts are strangely similar. Yet the application of that principle has brought startling results.

In the Childress case, the speedometer on the car had been tampered with so as to show only 8,000 miles of usage, while in the case at bar, it was made to state falsely that the car had not been run at all. In both cases, the purchaser relied on the seller's statements as to these matters. Where the court in the Childress case conceived rightly the law relative to a case of fraud, the court in the case at bar misconceived the principle governing the admissibility of oral testimony to show that fraudulent misrepresentations induced the making of the writing.

Quoting from the Childress case: "Parol evidence is admissible to show that the making of a written contract was procured by fraudulent misrepresentations. Evidence of this kind does not vary the written contract; it destroys and avoids it. It impeaches the written contract. Its purpose is to show that there was no valid, written contract, and a provision in a written contract that it contains all the stipulations entered into by the parties does not add anything to it."

In the case of *Henry vs. W. T. Rawleigh,* reported in 152 Mississippi, where the representation referred to is exactly the same as the one made in the case at bar, that is, as to the number of miles an automobile had run, the court says of the contention there made as to the right of the buyer to rely upon the representations of a seller as to the facts in the latter's knowledge, and the seller cannot escape responsibility by showing that the purchaser, by inquiry, might have ascertained that such representations were not true: "Contributory negligence is not a defense to an action based on fraud. If a false statement is made by one who may be fairly assumed to know what he is talking about, it may be accepted as true without question and without inquiry, although the means of correct information are in reach." "Representations with reference to the mileage of a car constitute representations of a material fact. It is a matter of common knowledge that machinery of

all kinds will depreciate from wear and tear, and especially is this true of an automobile."

Thus it is evident that the disconnecting of a speedometer and the connecting of it after the sale, was of itself, a fraudulent misrepresentation of a material fact, and, of itself, under the circumstances, here should be sufficient to avoid the contract. It may have been done with no other purpose than to deceive the buyer into the belief that the car had not been run. It served that purpose.

The facts of the case at bar are unlike those of several other Mississippi cases, which, at first glance, might mislead. The principles and their application are easily distinguished. In *Bellville Supply Co. vs. Dacey*, 106 Southern 818, where the court held that the dealer who was not a manufacturer did not impliedly warrant an automobile against the defects in the absence of fraud, we find the distinguishing fact that in the case at bar there was fraud in great degree. Also, in the present case there was more than an implied warranty; there was a direct warranty, an express warranty that the car was new and unused. The suit of the *Industrial Corp. vs. Wheat*, 107 Southern 382, held that there was no implied warranty in the case of a sale by a dealer who was not a manufacturer, *in the absence of fraud.* Here, also, there was no express warranty to the purchaser. The only warranty claimed was made, not to the purchaser at all, but to a third party who was to discount the paper taken in payment. Still another reason why the Industrial Finance Corporation was not liable for a warranty in that case was that it bought the paper without notice of any defect. Such, too, were the facts in the case of *Commercial Credit Co. vs. Summers*, 122 Southern 541.

The main contentions in the Raynor case were that there was fraud in the procuring of the contract, consisting of the fact that the seller represented the car to be a new one; that there being fraud in the procuring of the contract by the seller, there was no contract, but merely a written void instrument, inoperative and without effect; that the writing or alleged contract represented nothing of the parties intentions and parol evidence was entirely competent to show the real terms of the contract; that even if the contract were a valid one, which it is not, there has been a serious breach of an express warranty that the car was a new one; that even if no express warranty had been given, an implied warranty would have arisen as to the quality of the automobile, because, although in the absence of fraud there is no implied warranty of quality of a car when sold by a dealer, not a manufacturer, the basis and philosophy of this rule is the probability that such a dealer does not know of the defect in the car, if any, any more than the person to whom he sells, and they meet, therefore, on equal footing. That rule cannot apply here where its basis and purpose do not exist. Here is no sale by a manufacturer but by a dealer who knew, and knew that the purchaser did not know that the machine which he offered for sale had been run ten thousand miles, that the tires on its wheels were much worn from much use, that the spare tire was blown out and of little value. Defects in workmanship would be the fault of the builders, but does a factory run a car ten thousand miles before it sells to a dealer? Does a factory equip a car with worn tires and with a blown-out spare?

KARL WEIL.

RAILROADS—PRIMA FACIE STATUTE.—The appellant's railroad crosses a public street and on the occasion in question, appellee was driving an automobile along this street, and while attempting to cross the railroad tracks, was struck by one of the appellant's passenger trains, said train being propelled by gasoline. In the court below the appellee was awarded damages. Both the appellee and the appellant introduced evidence setting forth what each claimed were the facts and circumstances of the infliction of the appellee's injury, in which evidence there were a number of material conflicts.

According to the code of 1930, Sec. 1580, it is provided that in all actions against railroad corporations, and all other corporations, companies, partnerships, and individuals, using engines, locomotives, or cars of any kind or description whatsoever propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power, and running on tracks, for damages done to persons or property, proof of injury inflicted by the running of engines, locomotives, or cars of any such railroad corporation or such other corporation, company, partnership or individual shall be prima facie evidence of want of reasonable skill and care of such railroad corporation, or such other corporation, company, partnership, or individual, in reference to such injury.

The appellee asked for, and the court below instructed the jury for the appellee as follows, "that while proof of the injury by the running and operation of the train of the defendant, is prima facie evidence that the same was the result of negligence of the defendant, yet when you have heard all of the facts and circumstances, if you can determine from such facts and circumstances whose negligence and carelessness was the cause of the injury, then this presumption of carelessness must yield to the facts and you must decide the case upon the facts and not on the presumption. However, if there is such conflict of facts and theories between the testimony of the plaintiff and the testimony of the defendant as to prevent you from being able to determine how the injury was inflicted, then you must apply the inference of negligence against the railroad company, and render a verdict for the plaintiff."

The appellant objected to this instruction, and the Supreme Court in reversing the case, HELD that when in an action for damages for an injury of the character described in the statute, the facts and circumstances of the injury are given in evidence by the plaintiff at any stage of the trial, whether it conflicts with the similar evidence of the defendant or not, or are given in evidence by the defendant only, and which evidence the jury is without the right to reject, no instruction should be given to the jury on the statutory presumption. (*New Orleans & G. N. R. Co. vs. Walden.*)

Thus we see that in this case the Mississippi Supreme Court departs from a rule that they have followed with reasonable uniformity for some fifty years, and in so doing they expressly overrule the heretofore leading case of *Alabama & V. R. Co. vs. Thornhill*, in which case, and other like ones, the following rules have prevailed: "Even though the facts and circumstances are in evidence and although there may be no conflicts as to what these facts and circumstances are, unless they justify the court in directing a verdict, it is proper to charge the jury on request of the plaintiff that the proof of injury by the running of the cars is prima facie evidence of negligence, and on request of the defendant that, since the facts and circumstances under which the injury was inflicted are known, they will determine whether or not

the defendant was negligent solely therefrom without resorting to any presumption of negligence. BUT where there is a dispute as to the facts and circumstances, under which the injury was inflicted, it cannot be said that they are known in the legal sense until they have been found by the jury, and if the jury is unable for any reason, to determine from the evidence what the facts and circumstances are, they never, in the legal sense, become known, and consequently in such a case the inference of negligence drawn from the infliction of the injury remains in effect and determines the defendant's liability.''

In conclusion, let it again be noted that the Supreme Court of Mississippi, in deciding this case, has set a precedent, when they hold that no instruction should be given to the jury on the statutory presumption of negligence on the part of the railroad when there is a conflict of evidence as to the cause of the injury or damages, and which evidence the jury is without the right to reject.

EARL SOLOMON.

New Trial—Trial Judge Should Not Grant New Trial on Facts Within His Personal Knowledge, But Which Do Not Appear in Evidence. An automobile driven by the appellee was struck and the appellee was injured by an automobile driven by a servant of the appellant, and this suit is by the appellee for the recovery of damages therefor. The case was tried twice in the lower courts. In the first trial there was a judgment for the appellant, which was set aside by the court, and a new trial granted, in which a judgment was rendered for the appellee. After the rendition of the first judgment, the appellee filed a motion for a new trial, setting up among other grounds therefor misconduct of the jury, and a new trial was granted on these grounds.

The trial of the case was begun on Thursday. The jury, in accordance with the custom of the court, were not placed in charge of bailiffs, but were allowed to separate, and were under no restraint during the recesses of the court. The case continued through Saturday, on the morning of which the court of its own motion placed the jury in charge of two bailiffs, and thereafter kept them together until the conclusion of the trial.

During the course of the trial counsel for the appellee asked the court to state into the record if it was not a fact that the jury was allowed to separate for the first two days after the trial, and thereafter, the court of its own motion placed the jury in charge of bailiffs, and, if this was true, to give the reasons why it was done. The statement was objected to by counsel for appellant, and the court, while admitting that the statement was true, refused to give any reason therefor. The court later granted a new trial on the grounds of misconduct of the jury.

It was held by the Supreme Court that the evidence of the misconduct of the jury was insufficient for the granting of a new trial, consequently the ruling must be sustained, if at all, on facts which the trial judge personally knew, but which do not appear in the evidence. The question is, ''May a judge determine an issue between litigants by invoking his personal knowledge of facts not disclosed by the evidence?'' It was held by the court that a judge cannot give a judgment upon his private knowledge; for he must give

it according to law and what is proved. If he has private knowledge of a fact, he must be sworn as a witness, and each party have the opportunity to examine and cross-examine him. This ruling is in accord with the weight of authority.

The novelty of this case comes only through the rarity of the proposition and not through conflicting authority. It is the weight of authority that a judge cannot use private knowledge unless he becomes a witness and testifies, giving each party a chance to examine and cross-examine him. In the case at bar this was not done, so the court rightfully refused to sustain the ruling for a new trial.

While it is conceded that it is right for a judge to make use of personal knowledge only *after* giving it as testimony, still this has several fallacies. If the judge took the stand who would decide on a question of competency, or the admissibility of parts of the evidence, or commit for refusing to answer? If the judge takes the stand there is no one to keep him within the proper bounds. Instead of remaining, as is his duty and function, an impartial judge, he takes on for the time being the appearance of a partisan, endeavoring to uphold one side against the other. Further, the testimony offered by the judge would have too much weight with the jury. Where the judge took the stand he would be forced to pass upon the weight of his own testimony, and very probably would attach too much importance to it, or give it more weight than a similar piece of evidence offered by another witness. It would be only human nature to do this, but nevertheless it would prejudice the rights of one side.

On the whole, it would seem that not only is the practice impractical but it would tend to lower the standard of the courts and bring them into contempt.

These many objections, however, are largely overcome by two very practical circumstances. First, by the rarity of the judge having such personal knowledge as to enable him to decide the case. Second, where a judge has such knowledge as to be one of the chief witnesses, he would know beforehand of the usefulness of his testimony, and the cause would be sent by him to another judge for trial, thus relieving the embarrassing situation.

HUGH LOVE, JR.

BOOKS RECEIVED

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